Supreme Court, U.S.
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No. 95-

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, AND STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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93 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Where an individual alleges that he was discharged from public employment in retaliation for having exercised his First Amendment rights of free speech on matters of public concern, and the public employer moves for summary judgment based on the purported justification that the individual was discharged for reasons that do not or do not sufficiently involve matters of public concern, does the individual defeat the employer's motion for summary judgment where the individual makes a substantial factual demonstration that the public employer failed to reasonably investigate matters prior to rendering its decision and that the public employer's proffered justification is pretextual so that the trier of fact can reasonably infer that the individual was actually discharged in retaliation for having exercised his rights of free speech on a matter or matters of public concern?

(2) Where an out-of-state resident is hired for a managerial position in public employment so that he is in the position to hire other out-of-state residents, and that individual subsequently moves to the state but continues to be perceived as an out-of-state resident, is severely criticized for hiring a most qualified person from out-of-state, and then engages in free speech concerning the public employer's invidious discrimination against out-of-state residents, after which the individual is promptly terminated from public employment, does the individual have standing to bring an action against the public employer under 42 U.S.C. § 1985(3)?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported as *Voigt v. Savell*, 70 F.3d 1552 (9th Cir. 1995). A copy of the Court of Appeals' decision is set forth at Appendix A. (App. 1-26)

The decision of the United States District Court has not been reported. A copy of that decision is set forth at Appendix B. (App. 27-38)

JURISDICTION OF THE COURT

The Court of Appeals rendered its decision in this case on November 22, 1995. On February 9, 1996, the Honorable Justice Sandra Day O'Connor granted Petitioner J. Burk Voigt an extension to and including March 21, 1996 in which to file a petition for writ of certiorari.

Since Petitioner's case involves a controversy pertaining to rights and remedies under Article IV, §2, Clause 1 of the United States Constitution, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1983 and 1985(3), this Court has jurisdiction under 28 U.S.C. § 1254(1) to review via writ of certiorari the decision of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED IN THE CASE

This case involves the following constitutional provisions, statutes, and court rules. Since the provisions are

lengthy, pursuant to Supreme Court Rule 14.1(f), the pertinent text is set forth at Appendix C (App. 39-44):

The United States Constitution, Article III, §2, Clause 1;

The United States Constitution, Article IV, §2, Clause 1;

The United States Constitution, Amendment I;

The United States Constitution, Amendment XIV, § 1;

42 U.S.C. § 1983;

42 U.S.C. § 1985(3); and

Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

J. Burk Voigt was hired on July 17, 1989 by then-presiding Judge Mary E. Greene to be the Clerk of the Court and the Assistant Area Court Administrator for the Fairbanks trial courts in the State of Alaska Court System. Because Voigt was not an Alaska resident at the time, his hiring generated considerable controversy within the state, including within the Alaska Legislature and within the court system itself. Although Voigt became a permanent tenured employee one year later, he continued to be perceived as an out-of-state resident during the remainder of his employment with the court system. (App. 3, 64-65)

In January of 1991, Judge Richard D. Savell assumed the duties of presiding judge. Shortly thereafter, Judge Savell sought to hire a new Fairbanks Area Court Administrator (ACA). After interviewing four individuals for

the position, Judge Savell first offered the position to Judith Cramer, who declined the offer. Judge Savell then offered the position to Don Mills, who accepted the position on Friday, April 26, 1991. The following Monday, Cramer called Judge Savell and informed him that she had changed her mind and now wanted the position. After contacting several judges, not all of whom indicated their approval, and then speaking with Arthur Snowden, the Administrative Director of the Alaska Court System, Judge Savell notified Mills that his employment agreement had been cancelled. Judge Savell offered the position again to Cramer. (App. 4-5)

Voigt was critical of the way Judge Savell handled the ACA hiring and of the integrity and competency of Cramer. Voigt expressed his concerns at a meeting of various department heads of the Fairbanks court system on May 1, 1991. On May 15, 1991, Voigt received a written reprimand from Judge Savell for Voigt having expressed his concerns at the May 1 meeting. Although Voigt did not agree with the reprimand, he chose not to grieve it. In the end, Cramer once again changed her mind and never commenced the job as ACA, and Ronald Woods became ACA and thus Voigt's immediate superior in November of 1991. (App. 5-6, 53-54)

The next year, on February 7, 1992, Voigt hired Margaret Crawford, a non-resident of Alaska, for a court clerk position. Voigt chose Crawford over Roberta Demoski, a court clerk from Galena, Alaska, on the basis that Crawford – one of Judge Savell's former law clerks – was best qualified for the position in view of her legal experience, education, and personality. (App. 6)

Demoski, an Alaska Native, filed an informal grievance alleging that the hiring decision was racially motivated. Ronald Woods found the grievance to be without basis and thus affirmed Voigt's decision. However, on February 25, 1992, Judge Savell overruled Woods and Voigt and upheld Demoski's grievance. (App. 6-7, 54)

Voigt discussed Judge Savell's decision to uphold Demoski's grievance with at least five or six other court employees. Voigt expressed his concern that Judge Savell was retaliating against him for having stated his criticism of the Cramer/Mills ACA hiring. Voigt also voiced his concerns that in violation of both state and federal law Judge Savell and other members of the Alaska Court System were practicing a policy of discriminating against nonresidents in hiring for public employment. (App. 7)

Shortly thereafter, on March 24, 1992, Voigt received a letter from Judge Savell and Ronald Woods indicating that Savell and Woods intended to dismiss Voigt from his position. (App. 7, 67-74) A hearing was held, and Voigt was formally terminated on March 27, 1992. Voigt then began pursuing the court system's grievance procedure. However, when it became apparent to Voigt that he was unlikely to receive a fair and impartial hearing within the Alaska Court System itself, Voigt filed an action in the United States District Court on April 17, 1992. (App. 7) Voigt named as defendants Judge Savell and the other Respondents. Since Voigt's action alleged violations of his rights under the Privileges and Immunities Clause (Article III, § 2, Clause 1 of the United States Constitution), the First and Fourteenth Amendments to the United States Constitution, and the corresponding civil rights statutes 42 U.S.C. §§ 1983 and 1985(3), the United States District

Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

In the United States District Court, the defendants moved for summary judgment on Voigt's claims. In response to the summary judgment motion, among the evidence which Voigt presented was an affidavit from the senior sitting judge, Jay Hodges (App. 52-56), and three affidavits from an expert in personnel management, Dr. John N. Taylor of the University of Alaska Fairbanks, who reviewed and analyzed the Alaska Court System Personnel Rules, Voigt's personnel file, the pertinent decisional documents, and other materials generated during the course of matters (App. 45-51, 57-66).

In Judge Hodges' affidavit, he stated that of the four Clerks of Court during Judge Hodges' 15-year tenure, "Voigt was head and shoulders above the others in his professionalism as an administrator and in seeing that the Clerk's Office ran smoothly and efficiently." (App. 53) Judge Hodges added that when Voigt was Clerk of Court, Voigt's performance was outstanding and the office morale and friendliness were "at an all-time high" but had deteriorated since Voigt was fired. (App. 53, 55-56) Judge Hodges, however, warned that certain members of the courthouse bureaucracy were threatened by Voigt's improvements because "[t]hey did not like being accountable for their own actions." (App. 53)

In addition, Judge Hodges indicated his puzzlement that no one from the court system had ever asked him for his views or knowledge of the dispute. Also, Judge Hodges expressed amazement that Ronald Woods had signed Voigt's termination letter because Woods had told Judge Hodges that Judge Savell's decision to uphold the

Demoski grievance was not based on objective facts but was instead a politically-correct response to a baseless allegation of discrimination, that Arthur Snowden had expressed to him (Woods) that one should hire Alaskans and not residents from other states, and that – even after Voigt was fired – he (Woods) had no problem whatsoever with Voigt's work performance. (App. 54-56)

In his affidavits, Dr. Taylor examined the situation in detail. In essence, Dr. Taylor confirmed the accuracy of Judge Hodges' affidavit and concluded that Voigt's personnel file contained no disciplinary documents or actions other than the one May 15, 1991 reprimand by Judge Savell and, after the reprimand, contained consistently-above-average performance evaluations – even by Judge Savell. Dr. Taylor also concluded that in firing Voigt the court system had failed to conduct a reasonable investigation and review prior to rendering the dismissal decision, had failed to follow its own rules of progressive and constructive discipline, had inappropriately disciplined Voigt twice for his concerns about the Cramer/Mills ACA hiring, had evidenced an insidious and secretive conspiracy to prevent residents from other states from being hired for court system positions, and had engaged in a pattern of result-oriented, *post-hoc* fact gathering, all which strongly indicate that the termination of Voigt was done in bad faith and that the justifications for the termination offered by the court system are pretextual. (App. 45-51, 57-66)

Despite the evidence, the United States District Court, Judge James K. Singleton, Jr., granted summary judgment to the defendants. (App. 27-38) Although Judge Singleton acknowledged that the defendants had failed to follow personnel rules in dismissing Voigt (App. 37 n.4), Judge Singleton held, *inter alia*, that Voigt did not have

standing to assert a claim under 42 U.S.C. § 1985 (3) and that Voigt's speech did not involve a matter of public concern. (App. 35-37)

Voigt appealed Judge Singleton's decision to the United States Court of Appeals, which affirmed Judge Singleton. (App. 1-26) In rejecting Voigt's First Amendment claim, the Court of Appeals concluded – contrary to the affidavit of Judge Hodges – that there was undisputed evidence that Voigt's expressed concerns about the Cramer/Mills ACA hiring had damaged office morale and harmony. (App. 13) While the Court of Appeals recognized that it must be concerned with pretext in the explanation offered by the public employer (App. 12), the Court of Appeals attached no evidentiary significance to the timing and wrongfulness of Voigt's dismissal (App. 13, 17-18) and apparently ignored the detailed evidence of pretext presented in and with the affidavits of Judge Hodges and Dr. Taylor (App. 45-66). Thus, although the Court of Appeals held that Voigt did engage in speech involving matters of public concern, the Court of Appeals accepted the defendants' version and explanation of events as being factually conclusive and held that on balance the defendants' interest in avoiding the purported disruption in the workplace outweighed Voigt's First Amendment interest. (App. 11-18)

As to Voigt's claim under 42 U.S.C. § 1985(3), the Court of Appeals held that Voigt had neither primary nor third-party standing to pursue such an action. The Court of Appeals reasoned that since the class at issue is non-residents of Alaska, Voigt did not have primary standing because he had become an Alaska resident by the time of his dismissal and did not have third-party standing

because his position to hire non-residents as employees of the Alaska Court System did not establish a sufficiently close relationship with the non-residents. (App. 21-24)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States of Appeals for the Ninth Circuit has decided important federal questions in a way that conflicts with applicable decisions of this Court and also conflicts with applicable decisions of other United States Courts of Appeals on the same important matter.

For one, the Court of Appeals has incorrectly minimized the importance of the matters of public concern on which Voigt engaged in speech, and has thus improperly balanced Voigt's speech interest against the public employer's interest. Discrimination against non-residents which prohibits them from obtaining public employment is a matter of great public concern, and is the type of discrimination which Alaskans and the State of Alaska have previously demonstrated a distinct proclivity to practice. *See United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 218-21, 104 S.Ct. 1020, 79 L.Ed.2d 249, 259-61 (1984) (discussing but not deciding whether public employment is a fundamental right under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (striking down "Alaska Hire" statute as violation of Privileges and Immunities Clause); *cf. Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2852, 37 L.Ed.2d 853 (1973) (state statute which

prohibits non-citizens of the United States from obtaining civil service employment violates equal protection). Indeed, speech exposing or discussing illegal discrimination in the halls of justice involves matters of paramount public concern. *Cf. Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

Moreover, the Court of Appeals' affirming of the grant of summary judgment on Voigt's First Amendment claim is in direct conflict with several aspects of this Court's decision in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). For example, the Court of Appeals neglects to address the public employer's failure to have engaged in a reasonable investigation and corresponding failure to have taken reasonable care before deciding to dismiss Voigt. *See Waters*, 511 U.S. at ___, 114 S.Ct. at 1889-90, 128 L.Ed.2d at 700-02.

In addition, contrary to *Waters*, the Court of Appeals has affirmed the grant of summary judgment despite the existence of genuine factual disputes as to which speech formed the basis for Voigt's dismissal, as to whether that speech was or was not disruptive, as to whether the public employer reached its conclusions in good faith, and as to whether the stated basis or bases for Voight's dismissal are a mere pretext covering the public employer's actual motivation. *Waters*, 511 U.S. at ___, 114 S.Ct. at 1889-91, 128 L.Ed.2d at 700-04; *id.*, 511 U.S. at ___, 114 S.Ct. at 1891-93, 128 L.Ed.2d at 704-06 (Souter, J., concurring). In view of the substantial evidence of pretext presented in this case, there still needs to be a "[j]udicial inquiry into the genuineness of [the] public employer's asserted permissible justification." *Waters*, 511 U.S. at ___,

114 S.Ct. at 1895, 128 L.Ed.2d at 709 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment).

Given that Voigt's dismissal followed close on the heels of his statements concerning illegal discrimination in the hiring process, coupled with Voigt's exemplary personnel record, Judge Savell's prior hostility toward Voigt for Voigt's speech concerning the Cramer/Mills ACA hiring, and the public employer's failure to follow its own rules concerning constructive and progressive discipline, at the very least a factual dispute exists whether the public employer honestly believed that "the discipline chosen is an appropriate, and not excessive, response to the employee's speech as reported." *Waters*, 511 U.S. at ___*, 114 S.Ct. at 1872*, 128 L.Ed.2d at 705* (Souter, J., concurring).

In regard to Voigt's standing to assert a claim under 42 U.S.C. § 1985(3), consistent with the plain language of the statute, this Court has held that a person bringing suit does not have to be a member of the class to which the conspiracy directs its invidious animus; rather, any person who is injured in person or property by the conspiracy has standing to bringing an action for damages under 42 U.S.C. § 1985(3). *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 827, 103 S.Ct. 3352, 77 L.Ed.2d 1049, 1053 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 29 L.Ed.2d 338, 348-49 (1971).

A person has standing under 42 U.S.C. § 1985(3) if the defendants acted because of that person's association with or advocacy or support of the protected class. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, ___,

113 S.Ct. 753, 759, 122 L.Ed.2d 34, 45-46 (1993); *see also Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2nd Cir. 1982), *cert. denied*, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 110 (1982); *Richardson v. Miller*, 446 F.2d 1247, 1248-49 (3rd Cir. 1971); *Novotny v. Great American Savings and Loan Association*, 584 F.2d 1235, 1244-45 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Scott v. Greenville County*, 716 F.2d 1409, 1415 (4th Cir. 1983); *cf. Carpenters, supra*, 463 U.S. at 851 n.16, 103 S.Ct. 3352, 77 L.Ed.2d at 1069 n.16 (Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ., dissenting) (the legislative history of § 1985(3) "indicates classes that in particular circumstances or in geographic regions might qualify for protection because of their vulnerability"); *Browder v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980) (sectional animus comes within the ambit of 42 U.S.C. § 1985(3)).

In addition, since state agents are involved in the conspiracy in Voigt's case, and also since the aim of the conspiracy is to influence state activities, any injury the conspiracy inflicted on Voigt for exercising his First Amendment rights is actionable under 42 U.S.C. § 1985(3). *Carpenters, supra*, 463 U.S. at 830, 103 S.Ct. 3352, 77 L.Ed.2d at 1055.

Finally, as to a third-party standing, Voigt – as the person who is already in distant Alaska, and as the person who makes the hiring decisions and is otherwise intimately familiar and connected with the workings of the court system, and as one who is perceived as a *de facto* non-resident – would often be "the only effective adversary" of the court system's discriminatory policies and practices. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386, 392-93 (1969). Thus, even if Voigt did not have primary standing under 42

U.S.C. § 1985(3), he must nonetheless be deemed to have third-party standing.

CONCLUSION

For all the reasons stated, Petitioner J. Burk Voigt respectfully prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DATED at Fairbanks, Alaska this 21st day of March, 1996.

Respectfully submitted,

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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, AND STATE OF ALASKA,

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APPENDIX A

J. Burk VOIGT, Plaintiff-Appellant,

v.

Richard D. SAVELL; Ronald J. Woods; Karrold Jackson; State of Alaska, Defendants-Appellees.

No. 94-35721.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 13, 1995.

Decided Nov. 22, 1995.

Robert John and J. Burk Voigt, Fairbanks, Alaska, for plaintiff-appellant.

Frank S. Koziol, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before: WRIGHT, ALARCON and CANBY, Circuit Judges.

OPINION

ALARCON, Circuit Judge:

J. Burk Voigt appeals from the dismissal of this action against Richard D. Savell, Presiding Judge of the Fourth Judicial District of the Alaska Court System, and several

senior members of the Alaska Court System's administrative staff.[1] Voigt contends that the district court erred in granting summary judgment in favor of the defendants on his claims under 42 U.S.C. § 1983 for unlawful discharge in violation of his First Amendment right to free speech and his Fourteenth Amendment right to procedural due process. He further contends that the district court erred in granting summary judgment in favor of the defendants on his claim under 42 U.S.C. § 1985 in which he alleges that the defendants conspired to discriminate against non-residents of Alaska when hiring court personnel.

We affirm the district court's judgment. With regard to the First Amendment claim, an application of the balancing test articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), leads us to conclude that Voigt's speech is not entitled to constitutional protection in the context of his wrongful discharge action. We need not reach the merits of the Fourteenth Amendment claim because, in the district court, Voigt expressly abandoned his claim that the defendants violated his federal procedural due process rights. We affirm

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[1] In addition to Judge Savell, Voigt lists as defendants: Ronald J. Woods, Area Court Administrator for the Fourth Judicial District; Arthur Snowden II, Administrative Director of the Alaska Court System; Stephanie Cole, Deputy Administrative Director of the Alaska Court System; and Karrold Jackson, Personnel Director of the Alaska Court System. Voigt also names the state of Alaska as a defendant. The district court ruled that Voigt's claims for damages against the state are barred by the Eleventh Amendment. Voigt does not appeal from the dismissal of the State of Alaska on this ground.

the district court's judgment on Voigt's section 1985(3) claim because Voigt does not have standing to assert this claim.

I

Voigt was hired on July 17, 1989 by the Alaska Court System as the Clerk of the Court and Assistant Area Court Administrator for the Fairbanks trial courts. He became a permanent tenured employee one year later. Voigt's relationship with Judge Savell can best be described as strained from at least as early as January of 1991. On January 15, 1991, shortly after assuming his duties as the new presiding judge, Judge Savell sent two memoranda to Voigt expressing concerns about the way in which Voigt was carrying out his responsibilities. One of these memoranda stated that an action Voigt had taken had not been authorized and was "a real blunder." Voigt responded on January 17, 1991, with a memorandum to Savell, in which he addressed what he considered "the development of a very serious impediment to our relationship." In this memorandum, Voigt expressed confusion as to why Judge Savell considered him to be "the bad guy" with regard to various situations in the office and stated that "[w]hile your target may have been me personally, your indiscriminate and general comments deny the tremendous accomplishments my office has made[.]"

On March 24, 1992, Voigt received an intent-to-dismiss letter signed by defendants Savell and Woods. The five-page letter sets forth, as one of the reasons for Voigt's termination, his "consistent pattern of making

inappropriate statements to subordinate employees[,]" such as "statements to supervisors and other court employees designed to torpedo the selection of Judith Cramer as [a court administrator]." The letter also states that Voigt had engaged in insubordinate behavior, citing Voigt's criticism of Judge Savell's decision to uphold a grievance filed by Roberta Demoski, a resident of Alaska who complained when Voigt did not hire her for a clerk position.[2] Because Voigt relies on his speech regarding these two incidents as the basis for his First Amendment claim, we set forth the facts surrounding these incidents in detail.

In early 1991, Judge Savell sought to hire a new Fairbanks Area Court Administrator ("ACA"). After interviewing four individuals for the position in mid-April, he first offered the position to Judith Cramer, an Ohio resident and that state court's administrator. Cramer declined the position. On Friday, April 26, 1991, Judge Savell offered the ACA position to Don Mills, an Oregon resident and that state court's administrator. Mills accepted the position. The following Monday Cramer called Judge Savell and indicated that she had changed her mind and wanted to accept the position.

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[2] Several other grounds for termination were listed in the intent-to-dismiss letter. For instance, the letter lists eight separate instances in which Voigt is purported to have made inappropriate statements or engaged in inappropriate actions in dealing with subordinate employees. The letter also states, among other things, that Voigt "misused court resources for improper or harmful purposes[,]" and "violated Personnel Rule 6.05 governing overtime compensation."

Judge Savell consulted by telephone with every judge he could find in the district in order to obtain their consent to the cancellation of Mills' employment contract so he could award the position to Cramer. Every judge whom Judge Savell contacted approved of the proposed action, except for Judge Jay Hodges. Judge Savell then called Art Snowden, the Administrative Director of the Alaska Court System. Snowden approved the proposed action and authorized reimbursement to Mills for any losses or expenses he had incurred as a result of the recision of the agreement to employ him. Judge Savell notified Mills that the employment agreement had been cancelled and offered the position to Cramer.

Voigt was highly critical of the way Judge Savell handled the ACA hiring and of Judith Cramer, the person Judge Savell had chosen for the position. At a supervisor's meeting attended by the various department heads of the Fairbanks court system on May 1, 1991, Voigt stated that Judge Savell "lacked honor and integrity" in his handling of the situation. He also questioned Judith Cramer's integrity and competency.

Voigt received a written reprimand on May 15, 1991 from Judge Savell. Judge Savell stated as one of the reasons for the reprimand Voigt's criticism to other staff members concerning the manner in which Judge Savell handled the hiring of Judith Cramer. Judge Savell informed Voigt that his comments went beyond mere disagreement with the decision to hire Cramer and the manner in which the selection was handled. He indicated that Voigt's comments appeared to be an attempt to "torpedo" the selection of Judith Cramer and to undermine

any chance that she had of succeeding at her job.[3] Voigt testified at his deposition that he did not agree with the reprimand, but chose not to grieve it.

The second incident Voigt relies on as the basis for his First Amendment claim involves his criticism of a decision by Judge Savell to uphold a grievance filed by Roberta Demoski. On February 7, 1992, Voigt hired Margaret Crawford, a non-resident of Alaska, for a court clerk position, instead of Demoski, a court clerk from Galena, Alaska. Voigt testified that he hired Crawford, one of Judge Savell's former law clerks, because he felt that her legal experience, education, and personality best qualified her for the position.

Demoski filed an informal grievance following Voigt's decision. Judge Savell issued a decision on February 25, 1992, in which he concluded that Demoski's grievance was valid. He found that Voigt had applied improper criteria and had ignored a personnel rule when choosing Crawford over Demoski. Judge Savell ordered

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[3] In pertinent part, the May 15, 1991 reprimand reads:

> Your recent actions in dealing with court system employees locally have spread disharmony and have operated to undermine my attempts to improve case handling and cure some of the serious problems that we face. You may disagree with the decision I made in the selection of an Area Court Administrator, and you may likewise disagree with the manner in which I made that selection. Beyond disagreement, however, your actions appear to have been designed to torpedo my selection of Judith Cramer and to undermine any chance she has of being accepted in the building and succeeding at her job. . . .

that Demoski be transferred to the Fairbanks clerk's office so she could be placed in the first available position for which she was qualified.

Voigt discussed Judge Savell's decision to uphold Demoski's grievance with at least five other court employees. He expressed his concern that Judge Savell was motivated to issue the decision because he was "out to get" him, especially since Voigt had spoken out regarding the Cramer/Mills incident. Voigt also speculated that Judge Savell and possibly other members of the court practiced an unspoken policy of discriminating against non-residents of Alaska who apply for positions with the court system. He voiced this concern to at least one other court employee. Voigt never expressed his concern over the allegedly discriminatory hiring practices to the media or to any person who was not a court employee.

After receiving the intent-to-dismiss letter on March 24, 1992, Voigt requested a pre-termination hearing. The hearing was held on March 26, 1992, by Judge Niesje J. Steinkruger. The following day, Judge Steinkruger issued a decision in which she found reasonable grounds to believe that the charges against Voigt were true and supported the proposed action of termination of employment. Voigt was formally terminated on March 27, 1992.

Voigt pursued the Alaska Court System's formal grievance process which provides for an investigation by the Administrative Director's office. The investigator upheld Voigt's termination. Voigt did not pursue the next step in the court system's grievance process which provides for a hearing before a hearing officer because he felt he was unlikely to receive a fair and impartial hearing.

II

Voigt filed this action on April 17, 1992. The defendants filed a motion for partial summary judgment on August 9, 1993, seeking dismissal of all of Voigt's federal claims. The district court granted partial summary judgment in favor of the defendants on Voigt's federal claims and entered judgment dismissing all of Voigt's claims on June 20, 1994. Voigt's state claims were dismissed without prejudice to further proceedings in state court.

III

Voigt asserts that the defendants failed to comply with the merit principles mandated by the Alaska Constitution, Alaska statutes, and the court system's personnel rules in terminating his employment. In addition, Voigt asserts that there were numerous procedural deficiencies with the way in which he was terminated, such as the defendants' failure to provide constructive and progressive discipline as required by the personnel rules. Finally, Voigt asserts that the defendants violated his First and Fourteenth Amendment rights and conspired to violate the constitutional rights of non-residents of Alaska.

We review a district court's grant of summary judgment de novo. *Home Sav. Bank v. Gillam*, 952 F.2d 1152, 1158 (9th Cir.1991). Summary judgment is appropriate if, with the evidence viewed in the light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Id.*

Though "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment[ ] . . . the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' " *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983) (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734). Therefore, when a public employee asserts that he or she was discharged in retaliation for speech, "[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government" without compromising the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143, 147, 103 S.Ct. at 1688, 1690.

The threshold question in determining whether a public employee's termination violates the First Amendment is whether the employee's speech is entitled to constitutional protection. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir.1989). Voigt's speech is not protected in the context of public employment unless it involves a matter of public concern. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689. "The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7, 103 S.Ct. at 1691 n. 7.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690. Employee expression that can be fairly considered as relating to a

matter of political, social, or other concern to the community may be characterized as speech involving a matter of public concern. *Id.* at 146, 103 S.Ct. at 1689.

In *Connick*, an assistant district attorney opposed her proposed transfer to a different section of the criminal court. *Id.* at 140, 103 S.Ct. at 1686. She circulated a questionnaire soliciting the views of her fellow staff members concerning office policies, office morale, the level of confidence in certain named supervisors, and whether employees felt pressured to work in political campaigns. *Id.* at 141, 103 S.Ct. at 1687. The Supreme Court held that most of the questions in the questionnaire did not involve matters of public concern. *Id.* at 148, 103 S.Ct. at 1690-91. The Court reasoned that questions regarding office morale and policies did not relate to the performance of the district attorney as an elected official, nor did the assistant district attorney seek to inform the public that the district attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. *Id.* Instead, the questions relating to internal office issues were characterized as "mere extensions of [the petitioner's] dispute" with her supervisors over her transfer to another section. *Id.*

The Supreme Court concluded that the question whether any assistant district attorney ever felt pressured to work in political campaigns "touched upon a matter of public concern" because there is a "demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.* at 149, 103 S.Ct. at 1691.

The Court's analysis of the facts in *Connick* is instructive to our resolution of the question whether Voigt's speech involved a matter of public concern. Voigt's comments consisted primarily of criticism regarding the way Judge Savell handled two internal personnel matters. Such information carries little public import in that it does not seek to inform the public of Judge Savell's failure to discharge his duties as a judicial officer. Rather, as in *Connick*, Voigt's speech regarding the ACA hiring and the Demoski grievance can be characterized primarily as an extension of his personal dispute with Judge Savell in which Voigt attempted to galvanize support for himself by weakening staff support for Judge Savell. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983) ("Speech by public employees may be characterized as *not* of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies.") (emphasis added); *see also Havekost v. U.S. Dept. of Navy*, 925 F.2d 316, 318-19 (9th Cir.1991) (independent licensee's petition to other licensees calling for the ouster of their representative due to disagreements over "minutiae of workplace grievances" contained no hint of a matter of public concern).

We cannot say, however, that Voigt's speech is of absolutely no relevance to the public's evaluation of the performance of the court system. The public has an interest in knowing whether the court treats its job applicants fairly. *See McKinley*, 705 F.2d at 1114 (speech concerning information needed by members of society to make

informed decisions about the operation of their government warrants First Amendment protection). Because Voigt's speech referred to unfair discrimination against non-residents of Alaska, and to unfair treatment of job applicants in general, it can be characterized as touching on a matter of public concern. Thus, though we find that Voigt's speech primarily involved his personal disputes with Judge Savell, we cannot say that it was utterly devoid of public concern.

Because Voigt's speech touched on a matter of public concern, we must balance Voigt's interest, as a citizen, to comment on such matters, against the defendants' interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. Given the limited way Voigt's speech touched on issues of public concern, the defendants' burden should not be unduly onerous. *Id.* Nevertheless, a "real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views." *McKinley*, 705 F.2d at 1115.

The *Pickering* analysis requires particularized balancing based on the unique facts presented in each case. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691-92. The Supreme Court has explicitly declined to " 'attempt to lay down a general standard' " for determining when a public employer's interest outweighs the employee's First Amendment interest due to the " 'enormous variety of

fact situations in which critical statements by [ ] public employees may be thought by their supervisors [ ] to furnish grounds for dismissal[.]' " *Id.* at 154, 103 S.Ct. at 1694 (quoting *Pickering*, 391 U.S. at 569, 88 S.Ct. at 1735). Thus, we reject Voigt's argument that the defendants are unable to demonstrate that Voigt's speech was sufficiently disruptive simply because Voigt was not discharged immediately after he engaged in his speech.

The *Pickering* analysis requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691-92. For instance, the state may be justified in terminating the employee where the discharge is necessary to maintain "discipline by immediate superiors or harmony among coworkers" or to preserve the "kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Pickering*, 391 U.S. at 570, 88 S.Ct. at 1735.

The defendants presented evidence that Voigt's criticism of Judge Savell at staff meetings severely damaged office harmony and undermined Judge Savell's authority. Affidavits from three employees present at Voigt's staff meetings reveal that they felt Voigt's disparaging comments about Judge Savell and his choice for ACA were disruptive and undermining to office harmony. This evidence is undisputed.

The time, place, and manner of the employee's speech is also relevant to the question whether the

employing agency's institutional efficiency was threatened. *Connick*, 461 U.S. at 153, 103 S.Ct. at 1693. In *Connick*, the Court concluded that "[t]he limited First Amendment interest involved [did] not require that [the defendant] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154, 103 S.Ct. at 1694. The Supreme Court explained that the fact that the assistant district attorney exercised her right to speech at the office supported the defendant's fears that the functioning of his office was endangered. *Id.* at 153, 103 S.Ct. at 1693. The assistant district attorney's questionnaire also arose in the context of her employment dispute with the defendant regarding the application of an office policy. *Id.* Her attempts to solicit views regarding that policy from other staff were appropriately viewed by her employer as an attempt to threaten his authority. *Id.*

Voigt also exercised his right to speech at the office.[4] His statements were made in a staff meeting and in conversations with other supervisory level employees. His speech consisted of direct criticism of Judge Savell's

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[4] Voigt leaked to the press a memorandum from Judge Hodges to Judge Savell which was highly critical of Judge Savell's handling of the FJC A hiring. Memoranda between Judge Hodges and Judge Savell indicate that the working relationship between the two judges was undermined because Judge Savell thought Judge Hodges or his staff had leaked the memorandum. While it is undisputed that Voigt's conduct in leaking this document was disruptive, the defendants have not demonstrated that it played a part in the decision to terminate Voigt. Therefore, we will not consider this disclosure or its disruptive effects as part of the *Pickering* analysis.

handling of internal matters in which Voigt was directly involved. Moreover, his speech went beyond criticism of Judge Savell to include attempts to undermine the authority of a newly hired employee who would directly supervise Voigt. The form and context of Voigt's speech supports the defendants' concerns, reflected in Voigt's termination letter, that the functioning of the workplace was endangered.

The defendants have met their burden under *Pickering*. The limited First Amendment interest involved here does not require that the defendants tolerate actions which they reasonably believed caused disruption in the workplace and undermined the authority of Voigt's superiors.

Voigt argues that our recent decision in *Johnson v. Multnomah County, Oregon*, 48 F.3d 420 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995), compels a reversal of the dismissal of his section 1983 claim. We disagree. *Johnson* is readily distinguishable.

In *Johnson*, a public employee was disturbed by the fact that she did not receive her immediate supervisor's position when the position became vacant. *Id.* at 421. Johnson began making accusations about the new supervisor to coworkers and others which ranged from mismanagement and misuse of public resources, to allegations of criminal behavior. *Id.* at 424-25. We rejected the defendant's argument that because Johnson's statements were false and made with a reckless disregard for the truth, they could not be considered matters of public concern as a matter of law. *Id.* at 423. Instead, we held that "the recklessness of the employee and the falseness

of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test." *Id.* at 424.

In determining whether Johnson's speech involved a matter of public concern, we distinguished *Connick*, where the employee's speech arose in the context of an employee grievance *and* related to internal administrative procedures. *Id.* at 425. In contrast, Johnson's statements regarding criminal misuse of public funds, wastefulness, and inefficiency in managing and operating government entities were matters of *inherent* public concern. *Id.* at 425. Thus, despite the fact that Johnson "was embittered about not having been promoted," her speech did not constitute an "employee grievance" within the meaning of *Connick*. *Id.*

Finally, after applying the *Pickering* analysis, we held that the employer was not entitled to summary judgment on the ground that its legitimate administrative interests outweighed Johnson's First Amendment interest in free speech. *Id.* at 427. The employer had submitted evidence that Johnson's statements interfered with the close working relationship between Johnson and her supervisor, and undermined her supervisor's relationships with coworkers, subordinates and private vendors. *Id.* We held that the employer had to show more than mere disruption of office relationships. *Id.* We reasoned that the employer had to show actual injury to its *legitimate* interests in order to prevail under the *Pickering* test. *Id.* An employer does not have "a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means

of avoiding the disruption that necessarily accompanies such exposure." *Id.*

The instant case presents a significantly different factual scenario than *Johnson*. Johnson's speech included allegations of criminal wrongdoing and abuse of power. Such accusations involve matters of inherent public concern and the burden on the employer in demonstrating that its interests outweigh the First Amendment interest of the employee is correspondingly onerous. *See id.* at 426 (" '[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made' ") (citation omitted).

In contrast, Voigt's speech did not involve serious allegations of mismanagement or criminal corruption. Rather, Voigt criticized the wisdom and fairness of Judge Savell's decisions regarding internal personnel matters. In doing so, he touched upon matters of limited public concern. The facts in the instant matter parallel the situation described in *Connick*, where although the employee's speech was primarily related to an employee grievance, one aspect of it touched on a matter of public concern. *Connick*, 461 U.S. at 148-49, 103 S.Ct. at 1690-91. The Supreme Court made clear in *Connick* that where speech touches on an issue of public concern only in a limited sense, and arises within the context of an employee grievance, the employer's interest in avoiding disruption of the workplace may outweigh the employee's First Amendment interest. *Id.* at 150-53, 103 S.Ct. at 1691-93.

Assuming arguendo that Voigt can allege facts to support a wrongful discharge claim under state law, his

cause of action cannot be converted into a federal constitutional claim simply because Voigt was a public employee. *See id.* at 154, 103 S.Ct. at 1694 ("it would indeed by a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize [an] employee grievance").

IV

The district court dismissed as abandoned Voigt's claim under 42 U.S.C. § 1983 that the defendants deprived him of his Fourteenth Amendment procedural due process rights. Voigt received a pre-termination hearing, but chose to file an action in federal court rather than to pursue the full array of post-termination administrative remedies provided by state law. Throughout the proceedings before the district court, Voigt maintained that the defendants failed to comply with the state's clearly established substantive and procedural requirements. In his opposition to the defendants' motion for partial summary judgment, however, Voigt stated that he

> abandons his claim that procedural due process was violated by the manner in which the pre-termination hearing was conducted because *Loudermill* left undecided the specific minimal requirements of a pre-termination hearing. Defendants did not provide a full procedural due process hearing, but *Loudermill* and progeny have so far not required that.

Voigt argues that he did not abandon his contention that the defendants failed to follow the procedural requirements clearly established by *state* law, such as the constructive and progressive discipline procedures required by the Alaska Court System's personnel rules. Voigt asserts that an employer's personnel procedures provide the most obvious means for fixing the standards of procedural due process to which an employee is entitled.

Voigt's argument is based on the incorrect assumption that state law informs the second prong of the federal procedural due process analysis. This part of the analysis asks what process is due once it has been determined that the defendant has an interest protected under the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265. What procedures are constitutionally required if the state seeks to deprive the defendant of a protected interest is determined by federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492-93, 84 L.Ed.2d 494 (once it is determined that the Due Process Clause applies because state law creates a property right, the remaining question regarding what process is due is *not* to be found in the state statute). Where the plaintiff has been deprived of his property interest in tenured public employment, the minimum procedures required for Fourteenth Amendment purposes are set forth in *Loudermill*. *See Wheaton*, 931 F.2d at 617 (court could not, on the record before it, determine whether the plaintiff had received all of the process he was due, but cited *Loudermill* for the "root requirement"

of the Due Process Clause that the plaintiff receive a pre-termination hearing).

Voigt does not argue that the procedures established by Alaska state law are themselves inadequate to satisfy the federal constitution. *See Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980) ("minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action"). Rather, he contends that the defendants failed to follow the extensive procedures established by state law, such as constructive and progressive discipline. That claim must be presented to an Alaska court. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 95-96, 104 S.Ct. 900, 905-06, 79 L.Ed.2d 67 (1984) (claim against state officials that the officials failed to follow the requirements of a state statute is a state law claim). By abandoning his argument that the defendants failed to satisfy the pre-termination hearing requirement established in *Loudermill*, Voigt abandoned his federal procedural due process claim.

V

The district court granted summary judgment in favor of the defendants on Voigt's claim under 42 U.S.C. § 1985(3), in part on the ground that Voigt lacks standing to assert this claim. Standing is a purely legal issue which requires our independent or de novo determination, without deference to the district court's conclusion. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1454 (9th Cir.1995).

Voigt's section 1985(3) claim is based on two distinct theories: (1) the defendants conspired to deprive Voigt of his property interest in violation of his Fourteenth Amendment rights; and (2) the defendants conspired to violate the constitutional rights of non-resident job applicants, adversely affecting their rights to equal protection, privileges and immunities, and travel.

"Plaintiffs have standing under Section 1985 only if they can show they are members of a class that the government has determined 'require[s] and warrant[s] special federal assistance in protecting their civil rights.' " *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir.1994) quoting *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536-37 (9th Cir.1992) (alterations in original). Voigt identifies non-residents of Alaska as a class warranting special federal protection under section 1985. Voigt, however, is a resident of Alaska, and was an Alaska resident at the time he was discharged. Thus, he cannot show that he is a member of the class he has identified. Voigt states no claim under section 1985(3) that the defendants conspired to violate *his* constitutional rights.

With regard to Voigt's claim that the defendants conspired to violate the constitutional rights of non-residents, Voigt argues that he has third-party standing to assert non-residents' rights. "Although a plaintiff generally 'cannot rest his claim to relief on the legal rights or interests of third parties,' the Supreme Court has recognized an exception where the plaintiff meets [each of] the following three criteria: first, the plaintiff must have a concrete interest in the outcome of the dispute; second, the plaintiff must have a close relationship with the party whose rights it is asserting; and third, 'there must exist

some hindrance to the third party's ability to protect his or her own interests[.]' " *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir.1994) (citations omitted).

The "concrete interest" criterion asks whether the litigant has suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3, 109 S.Ct. 2646, 2651 n. 3, 105 L.Ed.2d 528 (1989). Voigt contends that he was fired in part because he failed to adhere to the defendants' unspoken policy of discriminating against non-residents. If the constitutional claim Voigt advances on behalf of non-residents is vindicated, he may be entitled to damages associated with his termination or injunctive relief reinstating him to his position. This is sufficient to show that Voigt has a concrete interest in the outcome of the dispute. *See id.* (lawyer's stake in $170,000 of forfeited assets which he would almost certainly receive if the Sixth Amendment claim he advanced were vindicated meets injury-in-fact requirement).

The second criterion for third-party standing requires that Voigt have a close relationship with non-residents of Alaska. Voigt asserts that because he is in a position to hire non-residents as employees of the Alaska Court System, he has a close relationship with non-residents sufficient to satisfy this criterion. We disagree.

There are two underlying rationales for permitting third-party standing where there is a close relationship between the plaintiff and the third party. *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). Where the enjoyment of the right the plaintiff

asserts is "inextricably bound up" with the activity the plaintiff wishes to pursue, the court "can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 114-15, 96 S.Ct. at 2874. In addition, "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115, 96 S.Ct. at 2874.

Voigt's only connection to non-residents is that he may occasionally be in a position to hire a non-resident for a position within the state court system. Such an intermittent connection does not sufficiently advance the underlying rationales for permitting third-party standing. *See Constr. Ind. Ass'n, Sonoma Co. v. City of Petaluma,* 522 F.2d 897, 904 (9th Cir.1975), *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976) (no standing where there was no special, on-going relationship between plaintiffs and those whose rights allegedly were violated).

A review of caselaw in which a close relationship warranted third-party standing further supports the conclusion that Voigt does not have a relationship sufficient to justify third-party standing. *See e.g., Griswold v. Connecticut,* 381 U.S. 479, 481, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965) (physician had standing to raise the constitutional rights of her patients where she was subject to criminal conviction under the challenged statute for serving those patients); *NAACP v. Alabama,* 357 U.S. 449, 458-59, 78 S.Ct. 1163, 1169-70, 2 L.Ed.2d 1488 (1958) (NAACP had standing to assert rights of its members not to reveal their affiliation with the Association because the NAACP and its members are in every practical sense

identical); *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1411 (9th Cir.1993) (plaintiffs had standing to assert their mothers' equal protection rights in challenging the constitutionality of a statute that granted citizenship to foreign-born children of United States citizen fathers but not to those born of United States citizen mothers, because plaintiffs' interests coincided with and were equally as intense as their mothers' interests).

Because we conclude that Voigt lacks third-party standing to assert non-residents' rights, we need not reach the question whether non-residents themselves are members of a class entitled to protection under section 1985(3).

VI

After granting summary judgment in favor of the defendants on all of Voigt's federal claims, the district court dismissed Voigt's state law claims without prejudice to their renewal in state court. Voigt argues that the district court "repeatedly erred in attempting to identify and separate appellant's federal civil rights claims from his state wrongful discharge claims." This argument is without merit. Voigt has misconstrued the district court's legitimate attempts to manage the case in order to avoid deciding issues involving unsettled state law unless federal claims were properly before the court.

Pursuant to 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction. *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir.1992), *cert. denied*, ___ U.S.

___, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993). The district court's dismissal of Voigt's state law claims was clearly within its discretion. *See id.* (" 'if the federal claims are dismissed before trial [ ] the state claims should be dismissed as well' ") (citation omitted).

VII

The district court denied Voigt's motion for reassignment pursuant to 28 U.S.C. § 455(a).[5] Disqualification of a district judge is appropriate under section 455(a) "where 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' " *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir.1993) (citations omitted). We review a district court's denial of a motion for disqualification for abuse of discretion. *Id.*

Judge Singleton served for 20 years as an Alaska state court judge. Voigt argues that Judge Singleton's impartiality is reasonably questioned in this case because the defendants include a judge and several administrators of the Alaska Court System. He also points out that two of Judge Singleton's former law clerks are involved in this case. One is named as a defendant in the case and the other is serving as counsel for the defendants.

In denying Voigt's motion, Judge Singleton described his minimal contact with the Fairbanks bench and bar,

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[5] 28 U.S.C. § 455(a) reads:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

including Judge Savell, to whom he was only recently introduced at a State-Federal Committee. Judge Singleton served as a superior court judge for the Third Judicial District during his service as a state judge. His chambers were in Anchorage, a significant distance from Fairbanks. His present federal court chambers are also in Anchorage and he has never lived in another community in Alaska. The judge explained that he has no ongoing personal relationship with any state judge or administrator named in the complaint or likely to be a witness. He further explained that with regard to his former law clerks, he has had no ongoing personal relationship with either of them in over fifteen years.

In rejecting the motion for reassignment, Judge Singleton quoted and applied the proper standard. A reasonable person informed of the foregoing facts would not conclude that Judge Singleton's impartiality might reasonably be questioned. The district court did not abuse its discretion in denying Voigt's motion seeking reassignment of the case to a different judge.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. Burk Voigt,)
Plaintiff,)
vs.)
Richard D. Savell, et al.)
Defendants.)

Case No. F92-012 Civil

FINAL DECISION REGARDING FEDERAL CLAIMS

(Filed May 9, 1994)

J. Burk Voigt ("Voigt") sues Richard D. Savell and others for an alleged violation of his federal constitutional rights. He relies upon 42 U.S.C. §§ 1983 and 1985. This Court has jurisdiction. 28 U.S.C. § 1343. Pending before this Court is a motion for summary judgment by the Defendants on the basis of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court issued a tentative decision on January 31, 1994, which was filed on February 2, 1994. *See* Docket No. 114. Oral argument was held on Monday, March 28, 1994. The Court issued an oral decision at that time, which is set out in this decision.

Voigt was an administrative officer of the state judiciary in the Fourth Judicial District of the State of Alaska. His firing prompted this lawsuit. Voight argues that his federal constitutional rights were violated. In addition, he

argues that his state statutory and constitutional rights were violated and that this Court should exercise supplemental jurisdiction over the state claims. *See* 28 U.S.C. § 1367.

I have concluded that Defendants are entitled to summary judgment on the federal claims on the basis of qualified immunity. My intention would be to dismiss the state claims without prejudice to their renewal in state court. The parties should address this question in a written response to be filed no later than Tuesday, May 31, 1994 at 12:00 p.m.

Before addressing Voigt's federal claims and the doctrine of qualified immunity, it is necessary to first address 42 U.S.C. §§ 1983 & 1985 because an understanding of the operation of those statutes in the context of federalism and comity is necessary to explain my reluctance to try the non-federal claims in this case.

The civil rights statues were enacted by Congress after the Civil War to address significant problems with the administration of justice. The recently-freed slaves had been granted citizenship along with a number of protections in the Civil War amendments to the United States Constitution, Amendments XIII-XV. Nevertheless, the climate of opinion in the former slave states, fueled by all of the emotions generated by the war, was definitely hostile to the exercise of those newly-given rights.

Congress responded by adopting laws which would provide a federal forum for the redress of grievances which, while theoretically redressable under state law, in practice were not addressable in a state forum. *See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961). It is clear from *Monroe*

and its progeny that the Supreme Court never viewed § 1983 as a general grant of jurisdiction to federal courts to provide a remedy every time a person could plausibly argue that she was the victim of a breach of contract or a tort by a state agent acting within the agent's scope of authority.

In the area of public employee discipline and discharge, it is particularly necessary to differentiate between legitimate claims of tort or breach of contract properly pursued in state court and legitimate claims of constitutional violation, which may be pursued in federal court. This is so for two reasons. First, a public employee complaining about her discipline or discharge need not exhaust her state remedies before suing in federal court, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982); consequently, such an employee will virtually always have state remedies available which can be presented within the supplemental jurisdiction of the federal court. Second, there are district court decisions that seem to blur the distinction between state and federal remedies and treat §§ 1983 & 1985 as establishing the federal courts as a super personnel board for the resolution of public employee grievances. In some cases, sensitivity to context suggests that the district judge engaging in such extensions of §§ 1983 & 1985 may have believed that the situation was akin to that in *Monroe v. Pape*, where state remedies were arguably available but were not available in practice. Such an inference is particularly supportable where the employee seeking a federal forum is a member of a group disfavored by the community in which the

case arises. In such a community, there may be justification in broadly reading § 1983 to swallow up the state laws governing employers and employees.

There is no such justification in Alaska because the courts of Alaska have always prided themselves on occupying the "cutting edge" in the expansion of the civil rights laws. *See, e.g., Ravin v. State,* 537 P.2d 494 (Alaska 1975) (recognizing state constitutional right to possess up to 4 ounces of marijuana in the home); *Breese v. State,* 501 P.2d 159 (Alaska 1972) (recognizing a schoolboy's constitutional right to wear his hair any length he chooses). I have addressed the readiness with which Alaska affords public employees substantial rights in discipline cases in *Witte v. Matanuska-Susitna Borough,* 787 F.Supp. 907, 909-11 (D. Alaska 1992). *See also Odum v. University of Alaska,* 845 P.2d 432 (Alaska 1993). In summary, the courts of Alaska are ready, willing and able to protect the civil rights of local litigants. Consequently, there is no need for a federal court sitting in Alaska to protect litigants' rights under state law; the state courts will do that. The federal courts may properly limit themselves to protecting litigants' federal constitutional rights.

Voigt complains that this Court required the parties to brief the issue of qualified immunity before they were ready to do so, thus inhibiting their rights in an adversary system. I do this in all public employee discipline cases because both parties, for different reasons, generally prefer a federal forum to a state forum for the resolution of state issues. *Witte,* 787 F. Supp. at 911-12 n.5. Plaintiffs assume that they will have to pursue the same discovery and marshal the same facts to prevail and the

litigation of all issues together may enhance the settlement value of the case while at the same time limiting the cost.

Public employers also gain a number of advantages. First, they litigate in Anchorage or Fairbanks rather than in more rural areas. *See, e.g., Wilson v. City of Kotzebue*, 627 P.2d 623, 633-36 (Alaska 1981) (holding that trial court improperly changed venue to Anchorage in action to recover damages for injuries to intoxicated prisoner; City persuaded trial court that it could not get a fair trial in its own community). Second, the federal courts are much more willing to grant summary judgment than are Alaska state courts. *Cf. Erickson v. Pierce County*, 960 F.2d 801, 805 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992) (summary judgment for county was appropriate because public employee failed to present facts sufficient to raise reasonable inference that her constitutionally-protected activities were a motivating factor behind employer's decision to terminate her), and *Sever v. Alaska Pulp Co.*, 978 F.2d 1529 (9th Cir. 1992) (affirming summary judgment for defendant on §§ 1983 1985(3) claims and dismissal without prejudice of state law claims), *with Cameron v. Beard*, 864 P.2d 538 (*Alaska* 1993) (affirming superior court's denial of state's motions for summary judgment seeking official immunity from public employee's claims of constructive discharge and intentional infliction of emotional distress).

In summary, most public employers would prefer to delay litigating federal rights until the whole record was developed so that the court would be required to consider both state and federal issues together. In my view, such a procedure infringes upon comity and federalism.

Where a litigant has substantial federal claims, she should be able to litigate her state and federal claims together in federal court to save time and cost. Where federal claims are insubstantial, however, comity suggests that the federal claims be resolved before the parties thoroughly develop the record on the state claims so that the state claims can be resolved in state court. *Cf. Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991) (immunity ordinarily should be decided by the court long before trial), *with United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed as well.").

Voigt makes two related but distinct arguments. First, he contends that all of the Defendants were parties to a conspiracy to discriminate between residents and non-residents in hiring to fill vacancies in the state judicial system support staff. He contends that he opposed this practice, and his opposition led in part to his firing. Voigt asserts standing in a representative capacity to assert the rights of non-resident prospective employees of the state judiciary under the privileges and Immunities Clause and Equal protection Clause of the Fourteenth Amendment to the United States Constitution. Voigt relies upon one Defendant's assertion that he thought such a policy would have been illegal to show that the law was clearly established at that time that discriminating against non-residents in hiring for state employment violated the United States Constitution.

The illegality of such discrimination is the linchpin of this aspect of Voigt's argument. I have determined that a state may allow its bona fide residents a preference in competing for state employment with non-residents; and

that, therefore, the policy, if it existed, did not violate the United States Constitution. Consequently, the law is not clearly established that such a policy violates anyone's constitutional rights, and the Defendants are entitled to qualified immunity on that claim.[1]

In addressing this issue, it is important to focus on Voigt's claim. He does not contends that any personal rule or state statute established a hiring preference for residents. He contends that Administrative Director Arthur Snowden and his aides established an informal policy of favoring residents over non-residents for some positions. Voigt cannot contend that this was a blanket policy since he was a non-resident living outside Alaska at the time he was hired. The same is true of the two contenders for the position of Area Court Administrator in Fairbanks, whose selection led to Voigt's second area of concern. On the other hand, there is evidence, albeit disputed, that Snowden and others preferred to fill vacancies with Alaskans rather than to hire applicants from out of state. Such a policy does not violate federal law unless it involves application of a durational residency requirement. Both the federal and state courts have

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[1] Voigt objects that the qualified immunity defense should not be available to conspiring public officials under § 1985(3), citing *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993). I do not find the reasoning of the Eleventh Circuit to be persuasive in this case. Moreover, the issue is essentially mooted by the fact that any "conspiracy" to favor Alaskans over out-of-state applicants for public employment positions would not violate the Constitution and would not be the type of "invidious discrimination" that § 1985(3) was designed to prevent.

found durational residency requirements for state employment to be in violation of the respective constitutions. *See, e.g., Attorney General of New York v. Soto Lopez,* 476 U.S. 898 (1986); *State v. Wylie,* 516 P.2d 142 (*Alaska* 1973).

On the federal side, the United States Supreme Court has distinguished between a bona fide residency requirement, which requires a person to establish residency before becoming eligible for state employment, and a durational residency requirement, which requires a period of state residency before becoming eligible for such employment. *Soto Lopez,* 476 U.S. at 903 n. 3; *Wylie,* 516 P.2d at 150. No federal case disapproves the former requirement for state employment, although a number of Supreme Court opinions refuse to allow such a preferential policy in related areas, such as the practice of law, *see, e.g., Supreme Court of new Hampshire v. Piper,* 470 U.S. 274 (1985), or to work on publicly-funded projects, *United Bldg. and Constr. Trades Council v. Mayor of the City of Camden,* 465 U.S. 208 (1984). Nevertheless, there is no constitutional impediment to a residency preference for public employment so long as it does not become a durational residency requirement. In fact, such a residency requirement does not impede interstate travel but instead requires it, since in order to be eligible for state employment, a person must travel here and establish residence.[2]

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[2] If we look only at the precise incident that Voigt contends evidences discrimination against non-residents, it appears that the discrimination was between a current employee seeking a transfer and a former employee, now residing out of state, seeking a position. There is nothing in the federal constitution that prevents the state from favoring its current employees in

In any event, Voigt does not have standing to assert the rights of non-residents seeking state employment. *See, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992). Case law makes it clear that non-residents have no trouble asserting their "right to travel" in litigation to establish their right to compete with residents for public benefits, and Voigt does not have any special relationship with non-residents that would make him an appropriate spokesman.

The second incident about which Voigt complains concerns Judge Savell's hiring of an Area Court Administrator. Two non-residents were contending for the position: Judith Cramer, a court administrator from Ohio, and Donald Mills, an administrator from Oregon. The judges apparently preferred Cramer and offered her the job. When she declined, the job was offered to Mills, who accepted it. Thereafter, Cramer changed her mind and Judge Savell attempted to rescind his offer to Mills so he could hire Cramer. Judge Hodges and Voigt took exception to this transaction, and Voigt publicly criticized Savell at a staff meeting and leaked a critical memorandum from Hodges to the press.

I have carefully examined this incident under the standards articulated in *Erickson*, 960 F.2d at 804. Assuming that Voigt's actions regarding the Cramer/Mills controversy contributed to his firing and that he would not

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competition with non-employees or former employees. Of course, state personnel rules may require open competition for jobs; but if Voigt believes that the court administration improperly applied state law, his remedy would appear to be in state court.

have been fired anyway, I am not prepared to find that Voigt's actions are entitled to constitutional protection. Voigt, as a supervisory employee, exacerbated an unpleasant situation by showing his disloyalty, bringing the controversy to the public's attention. While the controversy did not reflect well on the Fairbanks judges and may have been a matter of public amusement, it was hardly a matter of public concern. *See, e.g., Connick v. Myers,* 461 U.S. 138, 148 n.7 (1983).[3]

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[3] There is nothing in the record to suggest that Voigt was fired for advocating a position on a public issue. Voigt complains that he was fired in part for publicly disclosing the specifics of Cramer's employment to his subordinate staff members and to the press. As the Supreme Court in *Connick* explained, the Constitution does not permit state employees to publicly criticize their supervisors and their supervisors' policies with impunity on trivial grounds for the purpose of public amusement. The Constitution does protect "whistleblowers," men and women who bring matters of "public concern" to public attention. Both matters of public amusement and matters of public concern are "newsworthy" and are likely to attract media attention. In fact, the merely amusing is as likely to be printed or broadcasted as the truly significant. The distinction therefore does not turn on whether the media is interested, but whether the issue is one about which an informed public should be concerned in order to perform a citizen's functions. *See, e.g., Koch v. City of Hutchinson,* 887 F.2d 1436, 1448 (10th Cir.), *cert. denied,* 488 U.S. 909 (1988); *Jurgensen v. Fairfax County, VA,* 745 F.2d 868, 888 (4th Cir. 1984). Thus, if there were pervasive practices or consistent policies within the court system inimicable to the public welfare, Voigt and other state employees must be free to bring these policies and practices to public attention without fear of retaliation. The Cramer/Mills incident did not involve any pervasive practice or consistent policy, it was a single isolated incident. There is nothing in the record to connect Judge Savell's handling of the

In any event, I am not prepared to find that the law was so clearly established that Voigt's comments and actions in the context in which they occurred were entitled to constitutional protection to the extent that Savell and the others lost qualified immunity by relying in part on those actions in deciding to terminate Voigt. *See, e.g., Camarillo v. McCarthy,* 998 F.2d 638, 640 (9th Cir. 1993).[4]

IT IS THEREFORE ORDERED:

The Defendants' motion for partial summary judgment on the issue of qualified immunity at Docket No. 87 is GRANTED. The Court has tentatively decided to dismiss the state law claims without prejudice to their renewal in state court, unless "economy, convenience,

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Cramer selection to the other disputes within the Fairbanks courthouse, which apparently led to the critical review of that court's operation by an outside consultant.

No one contends that Voigt was solely responsible for the morale problems that apparently plagued the Fairbanks superior court. These problems were traceable in part to events that preceded Voigt's employment and in some respects were totally beyond his control. Nevertheless, by leaking Judge Hodges' memorandum to the press and publicly criticizing Judge Savell at staff meetings, Voigt made a bad situation worse *with no foreseeable public benefit in view.* His actions do not warrant constitutional protection.

[4] Voigt relies upon the affidavit of Dr. John Taylor to show a "conspiracy." Construing Dr. Taylor's affidavits in the most favorable way for Voigt, it may be there was a violation of the personnel rules. If so, Voigt's remedy is under state law, not federal law. Expert opinion is not relevant to a determination regarding the state of law. *Meyer v. Fidelity Sav.*, 944 F.2d 562, 577 (9th Cir. 1991), *rev'd on other grounds,* 114 S. Ct. 996 (1994).

fairness and comity" makes this Court a better forum for the resolution of the state claims. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 403-405 (1970); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir.), *cert. denied*, 113 S. Ct. 1644 (1992). Any party objecting to dismissal of the state claims without prejudice should file those objections on or before Tuesday, May 31, 1994 at 12:00 p.m.[5]

DATED at Anchorage, Alaska this 5 day of May, 1994.

/s/ James K. Singleton, Jr.
HONORABLE
JAMES K. SINGLETON, JR.
United States
District Court Judge

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[5] In my tentative decision at Docket No. 114, I discussed the facts and the law generally, intruding into some areas that were not directly germane to the issue of qualified immunity. It was not my intention to pre-try the state law claims or establish the law of the case to bind a later judge faced with Voigt's claims that his termination did not conform to state law. To the extent that any of my remarks could be so interpreted, they are disaffirmed. The only issues decided at this time are qualified immunity and Voigt's standing to assert a § 1985 claim.

APPENDIX C

THE UNITED STATES CONSTITUTION

Article III, § 2, Clause 1 provides:

Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

THE UNITED STATES CONSTITUTION

Article IV, § 2, Claus 1 provides:

Privileges and immunities; fugitives. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

THE UNITED STATES CONSTITUTION

Amendment I provides:

Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances.

THE UNITED STATES CONSTITUTION

Amendment XIV, § 1 provides:

Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 United States Code § 1985(3) provides:

Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Federal Rule of Civil Procedure 56 provides:

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may made such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX D

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,
Plaintiff,
v.
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,
Defendants.

Case No. F92-12 Civil

AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management at the University of Alaska, Fairbanks campus. My field of specialty is personnel management.

2. I do not know any of the parties in this lawsuit personally, although I have seen Judge Savell in court when I was a prospective juror and I have spoken to Area

Court Administrator, Ronald Woods once, shortly after his arrival in Fairbanks.

3. I have reviewed what I have been told by attorney Thomas Wickwire to be J. Burk Voigt's entire personnel file with the Alaska Court System, copy attached. I have also been told to assume as fact that Ronald D. Woods replaced Richard Savell as Mr. Voigt's immediate supervisor for the last five months of his employment.

4. I have reviewed the *Alaska Court System Personnel Rules*. This is a comprehensive set of personnel rules, typical of those found in any large private or government employer organizations. Such rules when followed should, in nearly all cases, meet the employer's duty of good faith and fair dealing with its employees. These rules also set up a system of progressive discipline.

5. Progressive discipline is the process of monitoring an employee's job performance in a fair and constructive manner by giving the employee notice of his deficiencies and communicating to him in order to improve them, providing instruction and training opportunities, then following that with feedback on the success of the employee's efforts to bring his performance back to acceptable levels. It is often called "progressive and constructive" discipline to emphasize the training on the identified deficiencies and the feedback elements of it because these are the elements designed to solve the problem; without them, the system degenerates to one of simply watching the weak areas of performance get worse until the problem grows to one needing a drastic solution, such as termination.

6. Progressive discipline steps, which should precede a termination for a performance deficiency, are typically verbal reprimand, written reprimand, short suspension, longer suspension, termination. These steps vary in their specifies with the organization. Sometimes three steps are sufficient and the specific method may also vary, but the process is the same. The important elements of each step are: (1) having a clear standard of performance, (2) notification of the areas that the performance is inadequate, (3) clearly informing the employee of what is expected to improve, (4) provide him the means and opportunity to improve, and (5) warning him that if he does not improve, harsher steps will follow.

7. In my opinion, the progressive and constructive discipline procedures required by court personnel rules 8.01.01 through 8.06 were not followed in Mr. Voigt's case prior to the March 24, 1992 decision to terminate him. The steps in progressive discipline, which should precede a decision to terminate, are not in Mr. Voigt's file. At worst, there were critical comments on Mr. Voigt's interpersonal skills in two prior evaluations but overall, rated him above satisfactory and recommended a merit pay increase. None of these criticisms were disciplinary and these evaluations were not followed by any follow up steps prior to the March 24, 1992, letter of notification of intent to dismiss. There is only one documented training session.

8. The only discipline step Mr. Voigt received was a Written Reprimand on May 15, 1991, from Judge Richard Savell, his immediate supervisor. I have been informed, and assume to be true, that Mr. Voigt's supervisor changed from Judge Richard Savell in early November

1991 to Ronald Woods. In Mr. Voigt's personnel file, there is no record of any further disciplinary action taken by Judge Savell or of any by Mr. Woods from the reprimand to the termination in late March 1992.

9. The "intention to dismiss: letter of March 24, 1992, restates some of the same incidents (as distinguished from new incidents of the same trait) that were in the May 15, 1991, Reprimand. It is widely considered by personnel professionals to be inappropriate to discipline someone for the same act which has been the subject of prior discipline. An example of this is in the March 24, 1992, intent to terminate letter, citing Voigt's criticism of Savell's decision to hire a certain person as Area Court Administrator then after using this same conduct as grounds for the earlier reprimand. This is unfair as a form of double punishment and procedurally, because repeated punishment for the same act denies the employee the chance to correct it.

10. The March 24, 1992 letter stating the reasons for the decision to terminate Mr. Voigt show, on their face, a series of supervision type errors. Assuming these acts are true, there should have been evidence of training in supervision since Mr. Voigt's hiring, but there is none. There is only one documented training session in his file and it is not on this topic. Whatever training an employee has had should be recorded in his personnel file to both give him credit for it and hold him responsible for using it.

11. In order for management to be acting in good faith in this process, the employer must provide current and valid job descriptions which clearly outline specific

duties and responsibilities and set the performance standards expected; performance evaluations then must focus upon the standards of those duties and responsibilities and be communicated to the employee; this should include a face to face conference with the employee; there should be a good faith effort on management's part to provide training, job coaching, counselling or some proactive or forward looking opportunity for the employee to make the needed corrections, e.g., learn new skills, assume new responsibilities or, use a different approach to the problem.

12. Mr. Voigt's performance evaluations should be based on and address his performance in those areas covered by his job description, but the job description is not in his personnel file, nor do the evaluations refer back to those as setting the standard. One example of this causing a problem, where it could have avoided one, is the criticism of Voigt, twice, for "playing games" with Judge Savell by not performing the duties of "Assistant Area Court Administrator" after Savell relieved him of the duties of "Acting Area Court Administrator." Since Voigt was instructed to do one but not the other, there should have been a clear line between the duties of these two positions, but such a line is not discernible to me from anything in Voigt's personnel file. There is neither a job description, nor any reference back to Voigt's job description that pointed him to where he should have known the difference between the duties of these two positions. There is nothing in Voigt's personnel file from which I can discern that difference or that indicates that Mr. Voigt should have known where that line was.

13. It is preferable for an employer to have all termination decisions independently reviewed prior to termination because experience has shown that the clash between the two principal personalities often causes reason and fairness to take second place to the desire of the supervisor to remove the problem by placing all responsibility for it on the subordinate.

14. Mr. Voigt's personnel file shows no independent review of Savell's and Woods' March 24, 1992 decision to terminate Mr. Voigt. By "independent review", I mean a review of the decision before the supervisor becomes committed to it, meaning before it is announced, and by someone with greater authority in the organization in personnel matters. The review decision by Judge Steinkruger of March 27, 1992 is not the kind of review process that should have been done because it was done after Savell's and Woods' decision of March 24, 1992 and because Judge Savell, as Presiding Superior Court Judge had greater authority in personnel matters than did Judge Steinkruger.

15. I have reviewed, either as a manager or consultant, at least 15 personnel decisions to terminate an employee. The March 24, 1992, intent to terminate letter is suspect in its collection of a variety of complaints all on March 23, 1992, without any indication of performance problems of that type in the six months or so prior to that where the progressive discipline record should have appeared.

16. The manner in which the complaints listed in the March 24, 1992, letter were collected indicates to me

that there was probably some other reason for the supervisors' decision to do this, i.e., it has the indications of a "witch hunt". I do not, however, have enough information on which to base an opinion on what may have preceded the decision to conduct the witch hunt; only that it is apparent to me that there probably was some other reason for the decision than what is stated in the March 24, 1992 letter.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 14th day of May, 1992.

/s/ Brian D. Fisher
NOTARY PUBLIC IN
AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX E

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,	)
Plaintiff,	)
v.	)
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,	)
Defendants.	)
Case No. F92-12 Civil	)

AFFIDAVIT OF JAY HODGES

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Jay Hodges, being first sworn, states:

1. I have been a Superior Court Judge in Fairbanks since December 1976. For approximately 5 years I was either the Presiding Judge or Acting Presiding Judge. Even when I was not the presiding or acting presiding judge I was involved administratively with the calendar and also interested in the overall work and efficiency of the Clerk's Office. I spend more time in the clerk's office

than any other Superior Court Judge and probably more than the District Court Judges.

2. During more than 15 years as a Superior Court Judge in Fairbanks there have been four Clerks of Court. Of these, Burk Voigt was head and shoulders above the other three in his professionalism as an administrator and in seeing that the Clerk's Office ran smoothly and efficiently. The Clerk's Office ran more efficiently than at any other time since I have been on the bench. Burk's management style is to make sure each person is responsible for his/her job and mistakes. This improved the efficiency since each person was responsible for his/her job.

3. One of his primary goals was serving the public in a professional, efficient and pleasant manner. During his tenure as the Clerk of Court, through his administrative abilities and hard work, the Clerk's Office achieved that goal. The morale and friendliness in the clerk's office was at an all time high when Burk was the clerk of court. It has deteriorated since he was fired.

4. Not everyone was happy with these changes and it is my perception that a few people did not welcome them and would have preferred the old ways. They did not like being accountable for their own actions.

5. Apparently, from the flowers and thank you card sent Judge Savell after Burk was fired some of the Clerk's office staff are happier, but the overall morale in the Clerk's Office has deteriorated.

6. From the time Ronald Woods came on the job as Area Court Administrator – November 1991 – to the

firing of Voigt in March 1992, I had numerous conversations with him about various administrative problem areas. One topic that was discussed frequently was the need for automation, and what had already been done on a local basis. On several occasions we discussed Burk Voigt's involvement with automation as well as other local projects. At no time did Ron Woods ever suggest there was any problem with Burk or that he was dissatisfied with his performance. In fact shortly after the initial investigation into the hiring of Megan Crawford, Ron Woods stated to me that Burk, he and I had to stick together. This statement came as a result of Judge Savell's overturning his (Ron Woods') determination that there had been no discrimination regarding Roberta Demoski. I had gone to Ron's office on a matter totally unrelated to this. Ron Woods volunteered that he was very upset at Judge Savell's determination that Roberta Demoski had been discriminated against. He knew that Judge Savell made the decision, not on objective facts, but based on a subject reaction to the Administration being upset that there was an allegation of discrimination involving an Alaska Native. Ron was adamant that there had been no discrimination in hiring Megan rather that Demoski. In fact, there were two other applicants who were rated higher than Demoski and thus she was not in contention for the vacancy. He also told me that Art Snowden had discussed the situation with him, implying that he should have understood local people should be hired rather that [sic] someone from "out of state". Ron told Art he did not understand this from his conversation with Stephanie Cole, but that if Art would put that policy in writing he would comply. Art said it was against the law to put the

policy in writing, but the message was clear. Even after Burk was fired, Mr. Woods told me – that he never had any problem with Voigt's work performance. This was surprising since he had signed Burk's termination letter. During this same conversation, Woods never could give me a clear statement as to what Ron thought Burk did wrong.

7. Neither Ron Woods nor Burk ever mentioned any verbal reprimand from Woods to Voigt. If there had been one, I would have known about it because of my close working relationship with Woods and/or Voigt before Voigt was fired. Woods never made a single negative comment about Voigt until Voigt was fired, and even then it was not clear to me what he meant regarding any problem areas with Burk. It is my belief that Judge Savell and/or the Administration put pressure on Ron Woods to make him change 180 degrees in his attitude toward Burk.

8. If Mr. Voigt were reinstated during the pendency of this case, I would gladly supervise Burk and the clerk's office, either with Woods or independent of Woods. I understand there may be friction between Voigt and Woods if they had to work together while this case was pending but, from my perspective only, I would have no problem working with Mr. Woods and Voigt and that it would be to the court system's advantage to have Mr. Voigt back, in that he is an outstanding administrator and would continue the efficient operation of the Clerk's Office. Attached is a letter I wrote regarding Burk's performance long before any of this came up. It should be in his personnel file. This reflects the outstanding work

Burk has done as the Clerk of Court. I have no reason to believe it would not continue.

9. Neither Frank Koziol, who I understand to be Defendants' counsel, nor anyone from the Administrative section of the court system's Anchorage office has asked for my views or knowledge of the dispute involved in this case. It is puzzling to me that they did not, particularly during the initial Demoski/Crawford investigation, since Megan Crawford initially contacted me regarding a Law Clerk job. This is the first contact she had with the Fairbanks Court System regarding a job since she left her position as a Law Clerk. I already had made arrangements for a Law Clerk, but because of her outstanding performance as a Law Clerk for Judge Savell and myself, and knowing she was moving back to Alaska I told her of a potential opening in the clerk's office, and told her if she was interested in that type of work to contact Burk. It is my understanding that she did in fact contact Burk.

/s/ Jay Hodges
Jay Hodges

SUBSCRIBED AND SWORN to before me this 14th day of June, 1992.

/s/ Brian D. Fisher
NOTARY PUBLIC IN
AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX F

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,
Plaintiff,
v.
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,
Defendants.

Case No. F92-12 Civil

SECOND AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
FOURTH JUDICIAL DISTRICT) ss.

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management at the University of Alaska, Fairbanks campus. My experience and qualifications are set out in detail in my first affidavit in this case of 14 May 1992.

2. In a personnel system with procedures for progressive discipline, such as that of the Alaska Court System, any criticism of an employee to be used as the basis for any discipline is required to be given to the employee in a contemporaneous manner, so the employee may know what is expected of him, have an opportunity to improve, state his rebuttal to it or grieve it, if he so elects.

3. The Alaska Court System Personnel Rules make it quite clear in Appendix B, that discipline and feedback to the employee is a daily responsibility of supervisors. The Court System takes a very modern and progressive position that supervisors have the clear responsibility to take positive action to prevent and progressively correct inadequate employee work performance. The *ex post facto* building of a file of work performance complaints clearly violates the rules, policies and procedures outlined in the Court's Rules and unjustifiably interferes with Mr. Voigt's right to fair dealing in the progressive disciplinary process and raises serious questions about the good faith of the defendants' actions because of this flawed process. The fact pattern of a long term employee, with a sequence of good performance evaluations, pay raises and no major just cause incident, with strong support from some segments of management (re: Judge Hodges' affidavit of June 14, 1992, which I have read) and the major efforts made by one segment of management *ex post facto* to find cause for dismissal, all closely resemble a typical pattern of a management/subordinate relationship suddenly gone sour over some unmentioned issue and management using its superior position to unfairly and unjustifiably terminate an employee for another less embarrassing reason.

4. Tenured public employees in permanent job positions in Alaska are entitled to greater procedural protection than private citizens. The Court System Personnel Rules were written with this intent in mind. Management's failure to comply with established procedures in their handbook violates the employee's right to good faith and fair dealing from the employer. For these reasons, any criticisms not in the personnel file have no bearing on whether the discipline was justified or appropriate and should be disregarded in evaluating whether the discipline was called for. Further, all performance incidents developed and gathered after the termination should be excluded from the employee's personnel file and also not be considered in this case in order to assure the fairness and integrity of the process.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 17th day of June, 1992.

/s/ Brian D Fisher
NOTARY PUBLIC
IN AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX G

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, v. RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA, Defendants.	)
Case No. F92-12 Civil	

THIRD AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management, with a speciality in personnel/Human Resource Management. I have been teaching, researching and consulting in this area of management for seventeen years, the last twelve years in Alaska at the University of Alaska Fairbanks. I

have taught courses in Personnel Management, Employment Law, Compensation Management, Leadership, Training and Development, Organization Design, Human and Organizational Behavior and Human Motivation. My government consulting clients include three agencies of the U.S. Government, state and city government departments, while my for-profit clients include small and medium services businesses. My consulting work includes management, supervisor training in personnel management topics such as proper hiring, interviewing, employment termination procedures, handling of grievances, and alcohol/drug/sexual harassment policies.

2. In my last affidavit, I identified a pattern of ex post facto case building to fire Mr. Voigt for some hidden reason other than the surface reasons given. The defense criticized my analysis by saying that I did not yet have access to all the information. Since my last affidavit, I have reviewed a substantial volume of new materials furnished to me by attorney Thomas R. Wickwire, as more specifically identified in paragraph 4. Now that I have been given access to the details of what took place, not just the outline of what took place and the defense's conclusions, I indeed have a much clearer insight into what happened, how and why.

3. As early as 1990, in the Fairbanks Judgeship Needs Report (see Fairbanks Judgeship Needs Study, December 1990, pp. 3, 17-22), serious problems were identified with the administration of the Fairbanks Court System. Some of the problems identified were absence of camaraderie among the judges, difficult work environment, biting, nasty communications and a serious lack of job descriptions. Further, no well-defined nor respected

chain of command existed and this had seriously damaged the court's morale as well as productivity. There were suggestions made that judges would ignore or thwart the Area Court Administrator (ACA) if he made decisions or policies that they did not personally like. It was also noted that "cliques" of power alliances had already developed in order to achieve personal goals. The power politics were having a bad impact on the court. One employee was quoted in the report as saying, "It is not safe to talk to anyone in this building." The report clearly held the judges, as the senior managers, accountable for fixing these problems and provided examples of how the judges themselves were the cause of some of the problems. The report concluded that these conditions made it impossible for the ACA to be an effective supervisor of the court staff. This conclusion would necessarily also apply to the Chief Clerk's ability to perform his job and supervise his employees effectively in such an unhealthy organizational environment. Within weeks of the report, the ACA was fired. The Chief Clerk, Burk Voigt, was then left to fill the vacuum in a hostile environment of role ambiguity, uncertainty of job duties as acting ACA and an unclear and often violated chain of command. Concurrently during this period, the new Presiding Judge, Judge Richard Savell, badly mismanaged the hiring of a new ACA. This incident was publicly reported in the newspapers and was a major embarrassment. These conditions necessarily increased the stress in working relationships between the presiding judge and the Acting ACA/Chief Clerk and exacerbated many of

the symptoms of an unhealthy working environment displayed by court employees, such as communication difficulties in understanding the intent of simple day-to-day messages, increased job stress, anger, hostility, fear and general emotional distress. Further, it becomes clear, as one studies the interviews between Karrold Jackson and others, particularly with Ronald Woods, that the Alaska State Court System has an overly centralized personnel management system, which leads to increased political behavior as every personnel action is subject to second guessing and managers at all levels feel their authority is undermined.

4. Given this atmosphere, and having read all of the interviews conducted by Karrold Jackson, Stephanie Cole, Ron Woods and Richard Savell prior to Voigt's firing, the investigation by Christine Johnson, in-house attorney for the Court System, all documents identified on the attached list, including, particularly, the statements of Judge Jay Hodges (see Affidavit of Jay Hodges, dtd. June 14, 1992), the judge with the most administrative experience and tenure in the Fairbanks Court System, it is my professional opinion:

a. that deflecting the blame for the morale problems at the court house to Burk Voigt was not justified, given the past history of morale problems, the violations of the chain of command within the court house and the overly centralized personnel system. Mr. Voigt was just another player in a sick system, in which any single supervisor/manager's behavior by itself might seem unusual when artificially put into the context of an ideal, healthy court system.

b. that on March 4, 1992 and again on March 5, 1992, the hidden intent of Cole, Savell and Jackson was revealed not only during employee interviews, but also during the interviews between Jackson and Woods that turned from a discussion to a discipline session where Jackson held Woods personally responsible for solving the Voigt problem (see Interview of Ronald Woods by Karrold Jackson of March 4, 1992, pp. 41-53). The interviews conducted by Judge Savell and Ms. Jackson were conducted in an atmosphere and manner which would reasonably be expected to undermine the authority of Burk Voigt and the morale of the majority of the employees who were not involved in the process. The clear focus of these interviews was to find anyone who had a complaint about the Clerk of Court, not in a balanced, fact-finding, problem solving approach. People who were positive about what was happening were not actively sought. The entire employee interview process of the 4th and 5th has the strong appearance of a pretext. Then when Ms. Jackson interviewed Ronald Woods, she made it very clear to him that he had not been listening carefully enough to the signals that were being sent to him not to hire from outside the state because of the pressure on senior court administrators that this practice brought from the legislature. In fact, she quoted directly from notes made by Sunny Ziots of Stephanie Cole's instructions to Ronald Woods, to wit: that Cole is adamant about not selecting from outside Alaska because this caused Legislators to call and ask questions and complain. He was further told of the legislative pressure that occurred when Burk Voigt was selected. Jackson further explained to Woods that there are still a lot of

objections to hiring a Clerk of Court from out of state. Woods then acknowledges that it had not registered on him that they had intended for him to break the law and not hire the best qualified, but hire only from Alaskan candidates when he and Voigt hired personnel for the Clerk's of Court office but, if it had registered, he would have complied. Jackson follows up with the reinforcement that he, Ronald Woods, had been warned as far as the senior administrators were concerned. Then, the following day, March 5, 1992 (see Interview of Ronald Woods by Karrold Jackson on March 5, 1992, pp. 6-8, 22-35), Ms. Jackson makes it crystal clear to Woods, since she apparently does not believe he listens between the lines very well, that Woods is seen as a supporter of Burk, his Clerk of Court, and that Presiding Judge Savell had told people that with Ronald Woods as the ACA, you could now trust Wood, not Burk. The inference here is clear: You, Ronald Woods, either line up with Presiding Judge Savell and the Court Administration or, as Ms. Jackson politely put it to Ronald Woods, "Your destiny is tied to the morale of this court." A few moments later, Ms. Jackson threatens to remove all hiring authority from Ronald Woods and makes it very clear to him that Voigt will never have any more hiring authority under her. Ronald Woods finally gets the message and he quickly comes to the conclusion that he must support the firing of Voigt and agrees to do so.

c. that another part of this pattern is Judge Richard Savell's complete reversal of the recommendations of his staff on the grievance of Ms. Demoski, whose grievance again created pressure about out of state hires. I have

reviewed the same staff reports and investigatory interviews that are apparently those which Judge Savell reviewed in making his decision. I do not find sufficient support to reach the same conclusion as Judge Savell's, whose opinion was that Ms. Demoski's grievance was valid and that the fault lies with the Clerk of Court, Burk Voigt.

d. that a pattern of abusive and illegally motivated decision making is evident. The hidden agenda is also now clear: Burk Voigt has caused political heat on the court by hiring an out of state candidate; he will not change his behavior and therefore is a political liability for the senior administrators in the court system; his own hiring is a political problem in itself; he must be fired and they will use morale issues as the pretext.

e. that Burk Voigt was wrongfully discharged in retaliation for his refusal to hire only Alaskans, his criticism of the mismanaged hiring efforts of Judge Savell to hire a new ACA and that his own hiring is a continual political liability for senior court administrators. It is also my professional opinion that the summary firing, of a permanent employee in this case, was not justified.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 24th day of August, 1993.

/s/ Thomas R. Wickwire
NOTARY PUBLIC
IN AND FOR ALASKA
My commission expires: 1-24-95

APPENDIX H

[SEAL]

SUPERIOR COURT
STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

Chambers of
RICHARD D. SAVELL,
Judge

804 BARNETTE STREET
FAIRBANKS, ALASKA
99701

March 24, 1992

J. Burk Voigt, Clerk of Court
Alaska Court System
604 Barnette Street, Room 342
Fairbanks, Alaska 99701

Dear Mr. Voigt:

We are advising you of our intention to dismiss you from your position as Fairbanks Clerk of Court effective March 26, 1992, at 4:30 p.m. You will be placed on paid leave until that time. The reasons for your dismissal are as follows:

1. You have engaged in a consistent pattern of making inappropriate statements to subordinate employees in the Fairbanks court. You have openly discussed with these employees problems you have had with and your criticisms of other employees' work performance. You have made statements of criticism of supervisors to their subordinate employees.

The statements of criticism have been made to employees in the clerk's office about other employees both inside and outside of the clerk's office. These statements have had an ever-increasing demoralizing effect on

the employees in the clerks' office. Your actions have created an oppressive and hostile work environment. These statements have subjected the court system to possible liability for claims from employees based upon unfair treatment and discrimination.

You received a written reprimand from the presiding judge dated May 15, 1991, citing, among other things, how your action in dealing with court system employees locally had spread disharmony and had operated to undermine attempts at improving case handling and curing some of the serious problems plaguing the court system in Fairbanks. Cited were your statements to supervisors and other court employees designed to torpedo the selection of Judith Cramer as ACA and to undermine any chance she had of being accepted in the building and succeeding in her job. You were warned that a failure to correct these deficiencies would lead to further disciplinary action, up to and including your dismissal.

Numerous additional inappropriate statements and actions in dealing with subordinate employees have recently come to light.

A. In August 1991, Personnel Director Karrold Jackson investigated the circumstances of a possibly coerced transfer of a civil clerk to records. It was found that you discussed a supervisor's poor performance with one of the supervisor's subordinate employees. Specifically, on July 26, 1991, you discussed Linda Chizmar's poor job performance with Martin Guerrero, one of her subordinates.

B. On March 23, 1992, an employee recounted statements by you in your dealings with her and your staff that you felt that the women in the office were like children and needed to be treated like children. Such a statement indicates a gender bias which is inappropriate, discriminatory, and has demoralizing effects.

C. On March 23, 1991, four employees of your office repeated that you had discussed your dissatisfaction with the performance of Civil Supervisor Linda Chizmar with each of them on numerous occasions. These employees include supervisory and non-supervisory employees who had no interest or reason for involvement in any problems that you were discussing.

D. On March 23, 1992, members of your supervisory staff disclosed to me that you have forbidden them from smoking together or mingling on their breaks to preclude communication between them on office matters of common interest.

E. On March 23, 1992, one of your supervisors advised me that last week you told her that she was to be removed from the Revisions in Progress (RIP) committee. She reports that she was warned by you that "it wouldn't be good" for her to disclose to or discuss with anybody that you were ordering her removal from the committee. She states you then said "you know what I mean," in warning that "it wouldn't be good." She felt threatened by your statement, tone and appearance, to the extent that she feared for her job and called the Personnel Director from her home during the evening.

F. On March 23, 1992, it was reported by one of your employees that you referred to your clerks in the civil department as "dumb clerks" when recruiting her for her position.

G. On March 12, 1992, in response to a memorandum from his secretary, Judge Savell sent a memorandum to all Fairbanks court employees seeking their opinions on the subject of file organization and restructuring. Upon your discovery of the memorandum, the employees in your office were subjected to a hostile, accusatory reaction, resulting in your interrogation of one employee to discover who had violated your edict forbidding staff from talking to the presiding judge. Your actions placed this employee in fear of retaliatory action.

H. I have just been advised that you ordered employees to "play dumb" in their communications with the new ACA.

2. You have misused court resources for improper and harmful purposes. On March 23, 1992, one of your subordinates reported that on numerous occasions you specifically directed her or another employee to execute and/or print computer generated reports or to shut down the computer at times that you knew would disable other departments/users and that you did so with the specific intent of harming court operations. She reported that you would routinely discard these reports without review or use, explaining that your sole purpose was to deny computer system access by other users or to monopolize printer equipment in order to establish your control thereof.

3. You have engaged in insubordinate behavior. Employees from your office have reported that you have been openly critical of the presiding judge's decision in the matter of the grievance filed by Roberta Demoski. You have made statements to subordinate employees that the presiding judge violated the personnel rules in ruling upon the grievance. You have stated that the judge's handling of the matter violated the merit system of employment. You have discouraged your employee from communicating their ideas and concerns to the presiding judge, in spite of the presiding judge's efforts to develop an open and positive work environment. You have attempted to undermine the presiding judge's action in front of subordinate employees.

4. You have continued to engage in poor personnel and supervisory practices despite the previous warnings from the personnel director and from the presiding judge. You have actively discouraged your employee from applying for other jobs within the organization. Employees have now reported that they were pressured by you into withdrawing applications for certain positions.

You have created the appearance of having preselected applicants for positions within your office. You have done this by interviewing the successful candidate without the other members of the interview panel present. And you have done this by disclosing your selection of some candidates before the selection and interview process was completed.

The recent grievance disclosed that inappropriate statements were made by you to an applicant for positions in your office. You have revealed the contents of confidential personnel grievance documents to a number of employees who did not have a reason to be involved in or know the existence of the grievance and its resolution. By doing so, by expressing your opinion about the lack of merits of the grievance, and by disparaging the ability of the grievant, you have undermined the ability of the grievant to survive in the work environment of the clerk's office.

You have created a work environment in which your employees fear retaliation for expressing opinions contrary to your opinions. As a result, many employees fear that they could lose their jobs with the court system at any time. Further, you have used the chain of command to stifle employees to the point of intimidation while, at the same time, you have ignored the chain of command beneath you.

It has also just come to my attention that you have violated Personnel Rule 6.05 governing overtime compensation. In so doing, you have exposed the court system to significant potential liability. During your tenure as Acting Area Court Administrator, you both permitted and directed an employee to perform various tasks which resulted in her accumulation of substantial overtime over a long period of time. Under Personnel Rule 6.05.04, you were not to permit employees eligible for overtime compensation to work additional hours beyond the employee's regularly scheduled work week without compensation. As the rule clearly states, an employee cannot

"volunteer" to work additional hours without compensation.

We believe that, given your past performance, any one of the above cited reasons would justify your termination. Additionally, please be advised that the specific instances set forth herein and justifying your termination are intended as examples only and are not necessarily all inclusive.

You have a right to request a pre-termination hearing, at which you may explain why you believe the dismissal is unjust, and you may call witnesses to support your position. This pre-termination hearing would normally be scheduled before me, as the area court administrator's superior. However, since I have participated in the investigation of the basis for your dismissal, I will ask Chief Justice Rabinowitz to designate another presiding judge for the purpose of holding a pre-termination hearing, should you request one. A pre-termination hearing, if requested, will take place within one working day of your receipt of this notification of intent to dismiss. You may request an extension of time if one day is not sufficient. A decision on the pre-termination hearing is due within one working day of the hearing. If you do not request a pre-termination hearing, or if the pre-termination hearing officer determines that the termination is warranted, you will be given a final notice of dismissal. You will then have a right to file a formal grievance in accord with Personnel Rule 9.05.

From this point forward, you are not authorized to enter or be within any non-public areas of the courthouse. You are directed to immediately surrender any keys or court system property in your possession.

Regretfully,

/s/ R D Savell
RICHARD D. SAVELL
Presiding Judge

/s/ Ronald J Woods
RONALD J. WOODS
Area Court Administrator

cc: Personnel Director